

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHERYL KATER,

Plaintiff,

v.

CHURCHILL DOWNS
INCORPORATED,

Defendant.

CASE NO. C15-612 MJP

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS

THIS MATTER comes before the Court on Defendant's Motion to Dismiss. (Dkt. No. 24.) Having considered the Parties' briefing and all related papers, the Court GRANTS the motion.

Background

Plaintiff Cheryl Kater brings this purported class action suit against Defendant Churchill Downs, Inc., asserting claims under Washington's Recovery of Money Lost at Gambling Act and Consumer Protection Act, and for unjust enrichment. (Dkt. No. 2.) Plaintiff alleges that Defendant's Big Fish Casino, a virtual game that allows users to play a variety of electronic

1 casino games such as roulette and blackjack, constitutes illegal gambling under Washington law.
2 (Id.) Plaintiff brings suit on behalf of herself and those similarly situated in order to recover
3 monies paid to Defendant inside the Big Fish Casino application, and for other relief, because
4 those monies were lost to an illegal gambling operation. (Id.)

5 Big Fish Casino is a virtual game platform that can be downloaded free of charge. (Dkt.
6 Nos. 2 at 3-13, 32 at 10-11.) Although users can play the games for free by using only the
7 virtual casino chips awarded to them without charge, users have the option to purchase additional
8 chips and a wide variety of other low-cost virtual items that enhance or extend gameplay. (Id.)
9 Users also receive additional chips as a reward when they win one of Big Fish Casino's games.
10 (Id.) Users are required to have at least a minimum quantity of chips in order to play the
11 games—if users run out of chips but wish to continue playing, they must either wait until
12 additional chips are awarded to them free of charge or they must purchase additional chips
13 directly from Defendant. (Id.)

14 Big Fish Casino's Terms of Use, which users must agree to before they can play the
15 games, state that the virtual chips have no cash value, and cannot be exchanged for cash or
16 merchandise, either at the Big Fish Casino virtual store or with other users. (Id.) Big Fish
17 Casino provides a mechanism inside of the application that allows users to transfer chips to other
18 users for a small fee. (Id.) Plaintiff alleges that Defendant knows about and facilitates a
19 secondary market where users exchange chips for actual money, and that Defendant profits from
20 these unauthorized exchanges by charging a fee to transfer chips from one user to another. (Id.)

21 Defendant now moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), arguing
22 that Plaintiff fails to state a plausible claim to relief because Big Fish Casino never awards any
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1 cash or merchandise prizes and therefore does not constitute “gambling” under Washington law.
 2 (Dkt. No. 24.) Plaintiff opposes the motion. (Dkt. No. 32.)

3 Discussion

4 I. Legal Standard

5 A. Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)

6 Under Fed. R. Civ. P. 12(b)(6), the Court may dismiss a complaint for “failure to state a
 7 claim upon which relief can be granted.” In ruling on a motion to dismiss, the Court must
 8 construe the complaint in the light most favorable to the non-moving party. Livid Holdings Ltd.
 9 v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). The Court must accept all
 10 well-pleaded allegations of material fact as true and draw all reasonable inferences in favor of
 11 the plaintiff. Wyer Summit P’ship v. Turner Broad. Sys., 135 F.3d 658, 661 (9th Cir. 1998).

12 Dismissal is appropriate where a complaint fails to allege “enough facts to state a claim
 13 to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A
 14 claim is plausible on its face “when the plaintiff pleads factual content that allows the court to
 15 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Aschcroft
 16 v. Iqbal, 556 U.S. 662, 678 (2009). As a result, a complaint must contain “more than labels and
 17 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
 18 Twombly, 550 U.S. at 555.

19 II. Recovery of Money Lost at Gambling Act

20 The Court finds that Plaintiff has failed to state a plausible claim to relief because
 21 Defendant’s Big Fish Casino game is not “gambling” under Washington law and therefore
 22 Plaintiff cannot recover for damages resulting from “illegal gambling.”

23 Plaintiff brings suit pursuant to the Recovery of Money Lost at Gambling Act
 24 (“RMLGA”), which provides:

1 All persons losing money or anything of value at or on any illegal gambling
 2 games shall have a cause of action to recover from the dealer or player winning,
 3 or from the proprietor for whose benefit such game was played or dealt, or such
 money or things of value won, the amount of the money or the value of the thing
 so lost.

4 RCW 4.24.070. Gambling means: (1) staking or risking something of value (2) upon the
 5 outcome of a contest of chance or a future contingent event not under the person's control or
 6 influence, (3) upon an agreement or understanding that the person or someone else will receive
 7 something of value in the event of a certain outcome. RCW 9.46.0237; State ex rel. Evans v.
 8 Bhd. of Friends, 41 Wn.2d 133, 150 (1952) (“...all forms of gambling involve prize, chance, and
 9 consideration...”).

10 The dispute here surrounds the prize element, and centers on whether or not Big Fish
 11 Casino awards a prize constituting “something of value.” Plaintiff asserts that Big Fish Casino’s
 12 virtual casino chips are prizes constituting things of value because although the chips cannot be
 13 exchanged for cash or merchandise directly, they (1) allow users to extend gameplay, and (2) can
 14 be sold to other users for actual money on a secondary market that Defendant facilitates and
 15 profits from. (Dkt. No. 32 at 12-22.) In support of her position, Plaintiff points to the 1973
 16 Gambling Act’s definition of “thing of value,” which defines the term to include “any money or
 17 property, any token, object or article exchangeable for money or property, or any form of credit
 18 or promise, directly or indirectly, contemplating transfer of money or property or of any interest
 19 therein, or involving extension of a service, entertainment or a privilege of playing at a game or
 20 scheme without charge.” RCW 9.46.0285 (emphasis added).

21 Defendant first argues that RCW 9.46.0285’s “thing of value” definition does not apply
 22 here because Plaintiff’s claim is brought under RCW 4.24.070 rather than RCW 9.46, and RCW
 23 4.24.070 does not define “thing of value” and does not specify that extended gameplay is a
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1 “thing of value.” (Dkt. No. 35 at 11-14.) This argument is unavailing. The 1973 Gambling Act,
2 codified at RCW 9.46, sets forth the law of Washington with regards to gambling, which both
3 Parties agree governs this case. (Dkt. Nos. 24 at 10-21, 32 at 12-22.) Defendant repeatedly cites
4 to RCW 9.46 throughout its briefing, including citing to provisions that mirror RCW 9.46.0285’s
5 “as used in this chapter” language. (See, e.g., Dkt. No. 24 at 18.) Moreover, in urging the Court
6 not to apply RCW 9.46’s definition of “thing of value,” Defendant argues the Court should
7 instead adopt the conclusion of the Washington State Gambling Commission, which found that
8 Big Fish Casino does not constitute gambling under Washington law because it does not award
9 cash or merchandise prizes. (Dkt. Nos. 24 at 11-17, 35 at 7-9.) In coming to that conclusion, the
10 Gambling Commission was interpreting RCW 9.46. (Id.)

11 Defendant next argues that even if extended gameplay can constitute something of value
12 in some circumstances, extended gameplay within Big Fish Casino is not a “thing of value” as
13 contemplated by RCW 4.24.070 because that gameplay can never be exchanged for money or
14 merchandise. (Dkt. No. 35 at 13-14.) Defendant argues that the definition of “thing of value”
15 found in RCW 9.46.0285 was adopted after courts in Washington and around the country found
16 that some businesses, in an attempt to circumvent anti-gambling laws that prohibited them from
17 directly awarding cash or merchandise prizes, were instead awarding “free plays” to users that
18 could later be exchanged for cash. (Id.) As an illustration, Defendant points to Brower v.
19 Johnson, where the Washington Supreme Court discussed a pinball machine operation with such
20 a design. 56 Wn.2d 321, 324 (1960). There, although the pinball machines “did not contain an
21 automatic pay-off device, they did contain a numbering device or meter. This meter indicated
22 the number of ‘free games’ won by a person playing the machines, and on this basis ‘over the
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1 counter' pay-off was made in each instance by the proprietors of the [taverns] in which the
2 machines were placed." Id.

3 Both Parties cite to Bullseye Distrib. LLC v. State Gambling Comm'n, 127 Wn. App. 231
4 (2005), the only Washington case to discuss RCW 9.46.0285's "thing of value" definition, in
5 support of their respective positions. (Dkt. Nos. 24 at 23, 32 at 14-15, 35 at 14.) In Bullseye, the
6 court affirmed an administrative determination that a sports card vending machine that operated
7 like a slot machine constituted a "gambling device" under RCW 9.46.0241(1) based on "play
8 points" it awarded that extended the privilege of playing the game without charge and, if they
9 exceeded a certain threshold, could be redeemed for cash or merchandise. 127 Wn. App. at 242.
10 Plaintiff alleges that the Big Fish Casino chips awarded to users when they win extend the
11 privilege of playing Big Fish Casino without additional charge, just as the play points awarded in
12 Bullseye did, and asserts that because the chips meet RCW 9.46.0285's "thing of value"
13 definition, they satisfy the prize element. (Dkt. No. 32 at 14-15.) Defendant argues that Big Fish
14 Casino chips cannot be things of value constituting prizes because unlike the free play credits in
15 Bullseye, Big Fish Casino chips can never be redeemed for cash or merchandise. (Dkt. No. 35 at
16 13-14.)

17 The Court finds that Big Fish Casino chips cannot satisfy the prize element required to
18 establish that Big Fish Casino constitutes "gambling" under Washington law. Plaintiff's reliance
19 on Bullseye is misplaced. Bullseye considered whether play points—awarded to consumers
20 when they purchased a sports card and then used to play a game of chance situated within the
21 vending machine—constituted "things of value" sufficient to satisfy the consideration element.
22 127 Wn. App. at 238. But the Bullseye court's discussion of whether or not extended gameplay
23 was "something of value" was framed by the fact that users could receive actual cash or
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1 merchandise prizes by playing the game in Bullseye if they reached a certain point threshold—a
2 goal that became increasingly achievable the longer the user played the game. See 127 Wn.
3 App. at 236. In other words, extended gameplay in Bullseye was valuable because that game
4 was not free to play, and because of its interaction with the game’s prize mechanism: additional
5 spins were only available in exchange for play points, and each additional spin increased the
6 likelihood that the user would reach the prize threshold, at which point the game ended and
7 money was awarded. Id. at 241-42.

8 Here, extended gameplay does not satisfy the prize element because unlike with the game
9 in Bullseye, Big Fish Casino is free to play and there is never a possibility of receiving real cash
10 or merchandise, no matter how many chips a user wins. While the chips do allow users to
11 continue playing the game, extended gameplay cannot result in any gain to the user, pecuniary or
12 otherwise, aside from the amusement that accompanies continuing to play a game that is already
13 available to play for free. (Dkt. No. 2 at 3-8.) This does not satisfy Washington’s requirement of
14 prize.

15 Plaintiff then argues that even if Big Fish Casino chips are not “things of value” for the
16 sole reason that they extend gameplay, they nevertheless constitute “things of value” because
17 they can be sold for actual cash on a secondary market to other users of Big Fish Casino. (Dkt.
18 No. 32 at 15.) Plaintiff asserts that users exchange actual money for chips on the secondary
19 market, and then transfer the chips to one another through an exchange mechanism provided
20 within Big Fish Casino. (Dkt. No. 2 at 2.) Plaintiff asserts that Defendant actively facilitates
21 these transfers, and profits from them by charging a \$1.99 fee for chip exchanges between
22 players. (Id.)
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Defendant argues that chips cannot constitute “things of value” on the basis that they can be exchanged for cash on an unauthorized secondary market because Big Fish Casino’s Terms of Use expressly prohibit the exchange of chips for money. (Dkt. Nos. 24 at 19, 35 at 9-11.) The Court agrees. The Terms of Use clearly state that users “have no property interest in any virtual item. . . . Virtual items may not be transferred or resold for commercial gain in any manner Virtual items may not be purchased or sold from any individual or other company via cash, barter or any other transaction. Virtual items have no monetary value, and cannot be used to purchase or use products or services other than within the applicable Big Fish Offering. Virtual items cannot be refunded or exchanged for cash or any other tangible value.” (Dkt. No. 5-1 at 2.) In other words, any user exchanging Big Fish Casino chips for cash on a secondary market is expressly violating the game’s Terms of Use, which users are required to agree to before they can access the game. (Dkt. No. 2 at 2.) Allowing Plaintiff and those similarly situated to sue Defendant for damages based on their own breach of contract would be contrary to basic principles of law and equity. See, e.g., First Mid Am., Inc. v. Palmer, 248 N.W.2d 30, 35 (Neb. 1976) (“It is axiomatic that the plaintiff cannot recover from the defendant for losses caused by its own breach of contract.”).

The Court finds that Plaintiff has failed to state a plausible claim for relief against Defendant under the RMLGA because Big Fish Casino does not award something of value satisfying the requisite prize element, and therefore the game is not “illegal gambling” under Washington law.

III. Additional Claims

The Parties agree that Plaintiff’s other claims are contingent on Big Fish Casino constituting illegal gambling in violation of Washington law. (Dkt. Nos. 32 at 22-27, 35 at 14-

16.) Because the Court finds that Big Fish Casino does not constitute gambling forbidden by Washington law, the Court finds that Plaintiff has failed to state a plausible claim for relief for violation of the Consumer Protection Act or for unjust enrichment. Defendant's Motion as to these claims is GRANTED.

Conclusion

The Court GRANTS Defendant's Motion to Dismiss. (Dkt. No. 24.) Because amendment would be futile, the Court DISMISSES this case with prejudice.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 19th day of November, 2015.



Marsha J. Pechman
Chief United States District Judge